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July 6, 2012

By CM/ECF

Mr. Leonard Green
Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

United States v. DTE Energy Co., et al.
No. 11-2338

APPELLANT UNITED STATES' RESPONSE TO APPELLEES' NOTICE OF SUPPLEMENTAL AUTHORITY

Dear Mr. Green:

Pursuant to Fed. R. App. P. 28(j), Appellant United States writes to respond to Appellee's citation of *Christopher v. SmithKline Beecham Corp.*, --- S.Ct. ---, 2012 WL 2196779 (June 18, 2012), as supplemental authority.

Christopher confirms the description of deference law set forth in the United States' briefing. *See* U.S. Brief at 48-50. In *Christopher,* the Supreme Court reaffirms that "*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation." *Christopher*, 2012 WL 2196779 at *8 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). Following *Auer*, *Christopher* recognizes that such deference does not apply where the agency's interpretation is "'plainly erroneous or inconsistent with the regulation'" or "'does not reflect the agency's fair and considered judgment.'" *Id.* (quoting *Auer*, 519 U.S. at 461-62). *Christopher* held that *Auer* deference did not apply in that case because the Department of Labor first announced its interpretation in 2009, long after the defendant's challenged conduct occurred; changed the reasoning in support of that interpretation after the Supreme Court granted certiorari; and had never pursued *any* enforcement activity based on its interpretation – dating back to the 1950s. 2012 WL 2196779 at *8-*9.

By contrast, EPA made clear in promulgating the 2002 Rules that they did not change enforceable pre-construction review: as the Agency explicitly stated, the 2002 Rules made only "minor changes" for utilities like Detroit Edison. U.S. Brief at 44-46; U.S. Reply at 10-15. Moreover, unlike the lack of enforcement noted by the Court in *Christopher*, EPA was actively

litigating enforcement cases based on its interpretation of the NSR rules before and after enacting the 2002 Rules. U.S. Reply at 32-33. Unlike *Christopher*, the exceptions to *Auer* deference have no relevance here. Instead, this is one of the "ordinar[y]" cases that require deference to the agency's interpretation. *Christopher*, 2012 WL 2196779 at *8.[1]

Sincerely,

s/Thomas A. Benson
Thomas A. Benson
Trial Attorney

CC: Counsel of record by CM/ECF

[1] Detroit Edison argues – for the first time – that it might lack fair notice. Such a claim is incorrect because EPA gave sufficient notice in its rulemaking materials. U.S. Brief at 44-46; U.S. Reply at 10-15. Further, this argument cannot be introduced in a Rule 28(j) letter.

CERTIFICATE OF SERVICE

I certify that on July 6, 2012, I served a copy of the foregoing letter upon the following counsel using the Sixth Circuit's electronic case filing system:

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